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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1225

JOHN R. GAGNON, Warden,
Petitioner,

- v. -

GERALD H. SCARPELLI,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the court below (Ap. 36) is reported *sub nom. Gunsolus v. Gagnon,* 454 F. 2d 416. The opinion of the district court (Ap. 36) is reported *sub nom. Scarpelli v. Gagnon* (E.D. Wis., 1970), 317 F. Supp. 72.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1971 (Ap. 36). Petition for certiorari was filed March 25, 1972, and certiorari was granted June 26, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a person convicted and sentenced by a state court with execution stayed, placed on probation in custody of a state agency, independent of the court, having sole authority to revoke his probation and execute the sentence, has a Fourteenth Amendment due process right to a hearing with assistance of counsel on whether grounds exist to revoke his probation.

The Court of Appeals held in the affirmative.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution

Section 1: "* * * [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Laws of 1907, Chapter 110

Parole of state prisoners: Section 4960c—1. The board of control is hereby given authority to issue a parole to any prisoner, with the approval of the governor, who is now or may hereafter be imprisoned in the state prison subject to limitations herein contained.

Legal control; monthly report. Section 4960c—3. All persons while on parole under the provisions of this act shall *remain in the legal custody and under the control of the state board of control and subject at any time to be taken back within said prison.* The board of control shall require monthly reports to be made by said paroled person and in addition thereto shall require monthly reports from the person in whose employment said convict may be at any time.

Re-imprisonment. Section 4960c—5. *Full power to take and re-imprison any paroled convict is hereby conferred upon said board of control* whose written order shall be sufficient warrant for any officer to take and return to the custody of the institution from which he has been paroled and all officers shall execute such order in the same manner as a warrant for arrest.

Laws of 1909, Chapter 541

Section 4734a. In all prosecutions for crime, except as hereinafter provided, where the defendant has been convicted either upon a trial or upon his plea, where the court has power to sentence such defendant to the Wisconsin State Prison or to the Wisconsin State Reformatory, any workhouse, house of correction or other correctional institution in cases in which the minimum penalty is one year or more, and it appears that the defendant has never before been convicted of a felony or misdemeanor, either in

this state or elsewhere * * * and where it appears to the satisfaction of the court that the character of the defendant and the circumstances of the case are such that he is not likely to again engage in an offensive course of conduct, and where it appears that the public good does not demand or require that the defendant shall suffer the penalty provided by law, said court may suspend the sentence or stay the execution thereof and place the defendant on probation in the manner hereinafter provided, giving his reasons therefor, which shall be made a part of the record.

* * *

Section 4734c. Whenever the defendant has been placed on probation under this act the effect of such order of probation shall be to *place said defendant under the control and management of the state board of control of Wisconsin* reformatory, charitable and penal institutions, and *he shall be subject to the same rules and regulations as apply to persons paroled from* said institutions after a period of imprisonment therein.

Section 4734g. Whenever it appears to the state board of control that a person placed upon probation as aforesaid does not conduct himself in accordance with the rules and regulations of the board of control with reference to persons paroled by them, a field officer representing the state board of control may upon its order without warrant or other process arrest said person, and either bring him before the court for sentence upon his former conviction, which shall then be imposed and not stayed by the court, or if sentenced to any penal institution, convey him to said institution, and the board of control may *after a full investigation and personal hearing* because of such conduct *forthwith terminate the probation and cause said person to suffer the penalty of the sentence imposed.* Any person under probation who has violated the conditions of his probation shall under order of the board of control be subject to arrest in the same manner as in the case of an escaped convict. In all cases of such termination of probation

the original sentence shall be considered as beginning upon the first day of imprisonment in the institution to which he is sentenced, and no period of probation shall be deducted therefrom.

Wisconsin Statutes 1945, 57.03 (1)

57.03 Recommitment on violation of probation; discharge. (1) Whenever it appears to the state department of public welfare that any such probationer in its charge has violated the regulations or conditions of his probation, the said department may, *upon full investigation and personal hearing,* order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. A copy of the order of the department shall be sufficient authority for the officer executing it to take and convey such probationer to the court or to the prison; but any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain the probationer and bring him before the board for its action.

Laws of 1947, Chapter 477

Section 5. 57.03 is revised to read:

57.03 RETURN TO COURT; DISCHARGE. (1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed or if already sentenced may order him to prison; and the term of sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.

* * * *

Wisconsin Statutes 1967, 57.01 (1), 57.02 and 57.03 (1)

57.01 Probation of felons. (1) When a person is convicted of a felony (convictions under s. 52.05 excepted) and it appears to the court from his character and the circumstances of the case that he is not likely again to commit crime and that the public welfare does not require that he shall suffer the penalty of the law, the court may, by order, withhold sentence or impose sentence and stay its execution and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose as a condition of such order or of continuing it in effect that he shall make restitution or pay the costs of prosecution or do both. The period of probation may be made consecutive to a sentence of imprisonment on a different charge, whether imposed at the same time or previously. Consecutive periods of probation may be imposed. In case the conditions of probation are violated, the current probation and all subsequent consecutive probations shall be revoked.

57.02 Control of probationer. Except as provided otherwise in section 57.025, *every probationer in the custody of the department shall be subject to the control of the department under regulations applicable to paroled persons.* Upon the entry of the order of probation the court or the clerk of the court shall deliver a certified copy of the record in the case to the department, whereupon the custody of the probationer vests in the department.

57.03 Return to court; discharge. (1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if already sentenced may order him to prison; and the term of sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison.

Wisconsin Statutes 1967, 57.06

57.06 Paroles from state prisons and house of correction. (1) (a) The department may parole an inmate of the Wisconsin state prisons or any felon or any person serving at least one year or more in the Milwaukee county house of correction or a county reforestation camp organized under s. 56.07, when he has served the minimum term prescribed by statute for the offense (which shall be one year unless a greater minimum is prescribed by the statute defining the crime) or one-half of the maximum of an indeterminate term or 2 years, whichever is least, or when he has served 20 years of a life term, less the deduction earned for good conduct as provided in s. 53.11. The district attorney and judge who tried the inmate shall be notified in writing at least 10 days before the first application for parole is acted upon and if they so request shall be given like notice of each subsequent application.

* * *

(3) *Every paroled prisoner remains in the legal custody of the department* unless otherwise provided by the department. *All prisoners under its custody may be returned to prison at any time,* on the order of the department, and shall be returned whenever found exhibited in any show. A certified copy of the order shall be sufficient authority for any officer to take the prisoner to the prison designated by the department. The officer shall execute such order as a warrant for arrest but any officer may, without order or warrant, take the prisoner into custody whenever necessary in order to prevent escape or enforce discipline or for violation of parole.

Wisconsin Statutes 1967, 57.072

57.072 Period of probation or parole tolled. The period of probation or parole ceases running upon the offender's absconding or committing a crime or some other violation of the terms of his probation or parole which is sufficient in the opinion of the court or the department to warrant revocation of probation or parole. It remains tolled until the

happening of one of the following events: *** in cases supervised by the department, *reinstatement of the offender's parole or probation by order of the department;* ***.

Wisconsin Statutes 1967, 57.13

57.13 Out-of-state parolee supervision; state compacts. The governor of this state is authorized and directed to enter into a compact on behalf of this state with any state of the United States legally joining therein in the form substantially as follows:

A COMPACT

Entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An act granting the consent of congress to any two or more states to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this contract (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there; or

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

(c) Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

(d) A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than 6 continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all such states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other

contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

(7) That this compact shall continue in force and remain binding upon such ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal or until finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending 6 months' notice in writing of its intention to withdraw the compact to the other states party thereto.

(9) This section may be cited as the "Uniform Act for Out-of-State Parolee Supervision".

STATEMENT OF FACTS

A. Facts of the Case

On July 9, 1965, Gerald Scarpelli was convicted in Wisconsin of armed robbery and received a 15 year prison term, execution of which was stayed and he was placed on probation for 7 years in the custody of the State Department of Public Welfare/[1] (App. 6, 9, 11). On the same day he signed the parole agreement by which he agreed among other things to make a sincere attempt to avoid illegal acts; to conduct himself honestly; to keep his probation agent informed of his

/[1] Now Department of Health and Social Services.

whereabouts and activities at all times; to submit such reports as may be required; to secure advance approval to leave the state; and if he proved himself unsuited to supervision, to hold himself ready to be placed in the institution to which he was committed. (App. 6, 12-13). He was also granted and accepted a travel permit authorizing him to go to Oak Park, Illinois, to reside at home until probation supervision could be transferred to Illinois, in which he agreed among other things to return to Wisconsin and report to his agent when instructed by the Department, and waived extradition to Wisconsin (App. 6, 15).

On August 5, 1965, he was accepted for supervision by the Adult Probation Department of Cook County pursuant to the Interstate Compact for Out-of-State Parolee Supervision, by a letter specifying that he resided in Oak Park, Illinois, and was employed in Glenview, Illinois (App. 6, 17). Oak Park is adjacent to Chicago on the west and Glenview is approximately 13 miles north of Oak Park and approximately 6 miles south of Deerfield, Illinois, according to highway maps.

On Friday, August 6, 1965, a home in Deerfield, Lake County, Illinois, was entered by Scarpelli and Frank Kleckner, who had been his accomplice in the Wisconsin robbery (App. 29). Police appeared within minutes in response to a burglar alarm and the men fled through a rear window, which Kleckner broke, Scarpelli cutting his hand and wrist. Kleckner was wounded by police and Scarpelli was captured while hiding in the neighborhood some time later (App. 22-30).

The Department came into possession of a *Chicago Tribune* account of the burglary (App. 27-30) containing a photograph of Scarpelli in police custody showing his cut hand and wrist (R. 34, App. 30), and of a transcript of an unsigned Q. and A. statement Scarpelli gave to an assistant state's attorney of Lake County, Illinois, in which he admitted the burglary and related the facts (App. 22-27). In his traverse in this case

Scarpelli admitted making the statement but gave an improbable explanation for doing so and of his cut hand (App. 31-33), but no explanation for his presence near the scene of the burglary in Deerfield, far from both his residence and his place of employment and ostensibly without means of transportation.

He was still on the case load of his Racine probation agent, who, with the approval of his district administrator, put through a Case History Review on August 20, 1965, recommending revocation of probation, which was concurred in, on August 27, by the Chief of Probation and Parole Services (App. 18-19), and probation was revoked pursuant to sec. 57.03 (1), Wis. Stats., without a hearing, by the Director of the Department on September 1, 1965, ordering Scarpelli taken in custody and delivered to the reformatory (App. 19-20).

He was brought back from Illinois on September 3 pursuant to the Compact, sec. 57.13 (3), Wis. Stats., (App. 5, 34) and delivered to the reformatory on September 4, 1965 (App. 21), as authorized by law and the probation agreement, paragraph 5 (App. 12).

B. Legislative Facts

Relevant parts of the statutes referred to herein are printed above immediately preceding the Statement of Facts, except as otherwise noted.

In 1907 by Ch. 110 by the Wisconsin Laws of that year, the legislature enacted various sections of the Statutes conferring power on the Board of Control/[1] to parole prisoners, who were to remain in the legal custody and under the control

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/[1] Now Department of Health and Social Services. At the time of this case it was known as the Department of Public Welfare.

of the Board, subject at any time to be taken back within the prison on the written order of the Board. No provision was made for a hearing and although the parole system remains substantially the same as in the beginning, hearings have never been provided for. (A system of mandatory release parole similar to 18 U.S.C. §4163 was enacted in 1951 whereby prisoners who have served their maximum terms minus good time allowances are not absolutely discharged but are released [or continued] on parole. See *Hughes v. Burke* [7th Cir. 1964], 334 F. 2d 795.)

Two years later, (Ch. 541 of the Wisconsin Laws of 1909), the legislature set up a system of probation applicable to all but certain adult felons, which is integrated with the parole system (except in Milwaukee County which is not involved here). The power of revocation was, except in a limited class of cases, vested in the State Board of Control but the statute (sec. 4734g), required that the Board conduct a "full investigation and personal hearing" and that it be by reason of failure to conduct himself in accordance with the rules and regulations of the Board of Control relating to *parole*.

The requirement of a "full investigation and personal hearing" continued in the probation statutes through the Wisconsin Statutes of 1945, sec. 57.03 (1). However, the hearings had been mere formalities since there was never any question regarding the fact of violation/[1] and accordingly the 1947 legislature, by Ch. 477, sec. 5 of the Wisconsin

/[1] The same condition (re parole revocations) was reported by 4 Attorney General's *Survey of Release Procedures* (1939), 246: "In practically every instance, the hearing on a parole violation is merely a formality to permit the returned violator to give his version of the events which led up to the revocation of his parole. As far as the parole authorities are concerned, the facts justifying the revocation of the parole almost invariably are clearly established before the time of (or concurrent with) the return of the offender to the institution."

Laws of that year, adopted a revised version of sec. 57.03 (1) *omitting the hearing requirement,*/[1] so that the revocation of both parole and probation thereafter was conducted by administrative practices which were identical. The relevant portions of the probation and parole statutes of 1967, which were in effect at the time of Scarpelli's revocation, were sections 57.03 (1) and 57.06 (3).

The Wisconsin courts have always had the option of either imposing sentence and staying execution or withholding sentence, and in either case placing the defendant on probation./[2] If sentence was imposed and execution stayed, the defendant upon revocation is taken directly to prison. If sentence has been withheld, upon revocation he must be "brought before the court for sentence *which shall then be imposed without further stay.*"/[3] Scarpelli belongs to the first group, whose sentences had been imposed and execution stayed.

In a general revision of Wisconsin criminal procedure statutes in 1969, the probation laws were revised and restated without any substantive change relevant to the issues of this case. Wis. Stats., 1969, secs. 973.09, 973.10 and 973.11, not printed in this brief. They were slightly amended by Wisconsin Laws of 1971, Ch. 298; and by Ch. 125, sec. 517 of the Wisconsin Laws of 1971 the legislature provided for the gradual phasing out of the separate Milwaukee County system of probation whereby probation has been managed by the criminal

/[1] Chapter 477, Laws of 1947 was Bill 256, S., introduced by an interim committee created by Joint Resolution No. 79 of the 1945 Legislature to "study any and all matters relating to the revision and codifying of the public welfare laws of this state * * * [and] report its findings and recommendations to the legislature of 1947 at the opening of its regular session."

/[2] Wis. Laws 1909, ch. 541, creating sec. 4734a, Wis. Stats.; Wis. Stats. 1967, sec. 57.01 (1).

/[3] Wis. Laws 1909, ch. 541, creating sec. 4734g, Wis. Stats.; Wis. Stats. 1967, sec. 57.03 (1).

branches of the county and circuit courts through the Milwaukee County Adult Probation Department, with power of revocation vested in the courts. These facts are mentioned for the Court's information only and have no bearing on this case; hence the statutes and session laws are not printed herein.

C. Facts Relating to Administration of the Law.

Materials relating to the administration of parole and probation revocation with special reference to Wisconsin are in the Addendum to this brief.

Wisconsin has no parole board in the usual sense. A group of employees of the Department so designated recommends the *granting* of paroles but has nothing to do with *revocation.* It was described thus in *Tyler v. State Department of Public Welfare* (1963), 19 Wis. 2d 166, 169, 119 N.W. 2d 460, which is still valid:

> "There are no statutory provisions governing the application for parole nor requiring a hearing thereon. The statutes do not provide for a parole board. The powers of the department are vested in the director, to be exercised under rules which he establishes with the approval of the State Board of Public Welfare.
>
> The parole board is governed by an administrative order of the director. The parole board consists of the director of the division of corrections and three full-time civil-service members. The board is required to conduct hearings on application for parole, and to follow a manual entitled, 'Parole Board Procedures and Practices.' The order states that the director of the department is the final authority and that the board is to make recommendation to him in an advisory capacity. We take judicial notice of both order and manual."/[1]

Both parole and probation revocations have hitherto, including the time of the *Scarpelli* case, been the business of

the "probation and parole services," in which the initial recommendation is made by the local probation and parole agent and is reviewed by his superior and ultimately by the chief of probation and parole services (now bureau of probation and parole). If all concurred in the recommendation for revocation it was referred to the Director (now the Secretary) of the Department, who made the revocation order (App. 18-20)./[1] Now, owing to court decisions, a hearing before a hearing examiner independent of the Division of Corrections is held on the recommendation of the bureau of probation and parole, and he reports his findings and recommendation to the Secretary of the Department.

SUMMARY OF ARGUMENT

Although *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016 forecloses argument that no hearing is constitutionally required on probation revocation, some clarification is needed concerning the extent of the hearing on whether the violations merit revocation, and the impracticability of probable cause hearings in out-of-state supervision cases.

Since 1963 the question of right to counsel in criminal cases has usually depended on application of the Sixth Amendment to the state through the Fourteenth, although some cases not within the Sixth Amendment find a right to counsel on other grounds such as equal protection or the need of the client for the guiding hand of counsel.

Probation and parole revocation is not a part of the criminal prosecution within the Sixth Amendment and therefore any right to assistance of counsel as a plain due process requirement depends upon the need for it. Reasons why criminal

/[1] Note, 1966 Wis. L. Rev. 527-529 (Addendum pp. 114-116).

prosecution defendants need counsel are examined and found inapplicable to revocation hearings. In fact, intrusion of counsel in such matters is affirmatively undesirable.

Probationers and parolees with money to spend for attorney fees ought to save it for when they get out or apply it to more fruitful uses, since counsel cannot be of any real help in forestalling revocation. Moreover, permitting them to appear by counsel may be a denial of equal protection to the poor and indigent, and assignment of counsel for the latter would be an intolerable waste of tax funds in these times when local and state governments are desperately short of money, and corrections, which needs more probation and parole agents rather than attorneys to engage in bootless litigation, must compete for the tax dollar with more visible and clamorous demands such as those of education, public assistance, law enforcement and dozens more.

ARGUMENT

I. It Seems That The Argument That No Hearing Is Required On Revocation Of Probation Is Now Foreclosed By This Court's Decision In *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016.

A. Parole and probation cannot be distinguished.

The statement of the question presented was intended to raise the issue of whether any hearing was required on revocation of probation and if so whether the probationer was entitled to assistance of counsel.

In the parole case of *Morrissey v. Brewer*, decided three days after certiorari was granted in this case, this Court disposed of the first part of the issue, since there is

no substantial distinction between revocation of probation following sentence and revocation of parole, as practiced in Wisconsin. Arguably, a probationer has even more to lose than a parolee, but that is more theoretical than real. The authors of the materials on *Criminal Justice Administration* printed in the Addendum to this brief, say at page 912 that those who make the revocation decision tend to be more cautious with revocation of probationers than they might be of parolees,/[1] but that is a slim reed on which to lean a legal distinction.

Accordingly, counsel for petitioner herein accept that the probationer is entitled to be heard, but with some reservations regarding the probable cause hearing, especially with regard to probationers and parolees like Scarpelli supervised out of state, as will be explained below.

B. The required extent of the hearing needs clarification.

Aside from the question of the out-of-state cases, a very troublesome problem exists in connection with the second question to be decided at the revocation hearing, whether the violation merits revocation. The materials in the Addendum, particularly Ms. Hunt's master's thesis, show that the revocation decision frequently depends upon collateral facts apart from the sometimes relatively minor violations. These collaterals are frequently a series of events disclosing unresponsiveness to or rejection of supervision, deterioration in adjustment to community living, or need for services available in the institutions but not in the community such as AA or psychiatric therapy. Sometimes the experience of the offender during prior terms of probation or parole, or his psychiatric appraisal at a penal institution or mental hospital, is relevant.

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[1] Addendum p. 185

The question is, then, whether all such matters, which are not easily susceptible of proof, must be established at the hearing with confrontation on demand or ignored in the revocation decision, however strongly they appear in the Department's chronological records. This claim is now being made on the basis of *Morrissey*.

Courts in making their sentencing decisions (even in so solemn a matter as choosing the death penalty) are permitted to use information supplied in pre-sentence reports by probation officers without submitting it to litigation at a due process hearing, precisely because probation officers are considered reliable and unbiased as investigators of such matters. *Williams v. New York* (1949), 337 U.S. 241, 249-251:

> "Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. *The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.* Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

"The considerations we have set out admonish us against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. * * *" (Emphasis supplied.)

It would be anomalous now to hold that the officers whose reports may be accepted by the courts may not themselves use the information in arriving at a comparable decision whether or not to revoke probation or parole.

It will not do to respond that a court is more venerable, wise and honorable than an administrative officer or body, that judicial powers are specially conferred by the Constitution, that sentencing is an ancient judicial power while revocation of probation by an administrative body is a statutory newcomer, or whatever like pious contention may occur to one. The facts are that judges are lawyers and probation officers are social workers and both are men and women trying to do the right thing in like circumstances.

II. The Preliminary Hearing Commanded By This Court In *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016, 5020-5021, Is Impractical In Interstate Cases.

In *Morrissey*, this Court held that not merely one, but two hearings are required, the first a preliminary hearing to determine probable cause.

It has been considered settled that in criminal prosecutions, due process does not require a preliminary hearing.

Goldsby v. United States (1895), 160 U.S. 70, 73;

Lem Woon v. Oregon (1913), 229 U.S. 586;

United States ex rel. Kassin v. Mulligan (1935), 295 U.S. 396, 400;

Odell v. Burke (1960), 281 F. 2d 789;

M.A.P. v. Ryan (D.C. App. 1971), 285 A. 2d 310.

Cf. *Coleman v. Alabama* (1970), 399 U.S. 1, 8, 17-18.

If this is true in the case of persons who are merely charged but not yet convicted, it comes as a surprise to learn that it is not true of persons who have been convicted and who are in the custody of a department which is in possession of information considered by it sufficient to initiate revocation proceedings.

But be that as it may, this new rule presents special problems where the parolee or probationer, as in Scarpelli's case, has been given the benefit of the law permitting him to leave the convicting state and be supervised elsewhere. It will be particularly troublesome if this Court should hold that the convict is entitled to representation by counsel at such a hearing.

Scarpelli was permitted to go to Illinois for supervision under the interstate compact authorized by act of Congress, the text of which is printed above as sec. 57.13, Wisconsin Statutes of 1967, which is in effect in all the states, Puerto Rico and the Virgin Islands. Records (not in the record of this case) of the Wisconsin State Department of Health and Social Services (successor to the Wisconsin State Department of Public Welfare, successor to the Wisconsin Board of Control) disclose that on June 30, 1972, Wisconsin had a total of 642 parolees and probationers, including a handful of juveniles under the Interstate Compact on Juveniles, in other states, of whom 374 were adult probationers. Border states were supervising the following numbers of Wisconsin probationers and parolees:

Illinois, 199;
Minnesota, 156;
Michigan, 35;
Iowa, 13.

But substantial numbers were being supervised in distant states, for example:

Arizona, 12;
California, 35;
Colorado, 15;
Florida, 19;
Hawaii, 1;
New York, 11;
Puerto Rico, 8;
Texas, 19.

Figures released by the Council of State Governments, 36 West 44th Street, New York, New York 10036, in January 1972, showed that in 43 states, Puerto Rico and the Virgin Islands reporting adult parolees sent out of state for supervision and in 42 states, Puerto Rico and the Virgin Islands reporting adult probationers sent out of state for supervision, 24,693 persons were assigned for supervision out of state on June 30, 1971. For case load figures for June 30, 1964, as reported by 46 states, see the *Handbook on Interstate Crime Control* (1966), page 9. Owing to imperfect reporting, these figures must be regarded as minimal.

Under section 3 of the Compact (Wisconsin Statutes 1967, sec. 57.13 (3)) the sending state may at any time retake the probationer or parolee from the receiving state without formality and without extradition (unless he is charged with or suspected of crime in the receiving state, when the consent of the receiving state is required) and the decision of the sending state to retake is not reviewable within the receiving state.

Under the rules, the receiving state is required to notify the sending state promptly of a parole violation, giving both the official and the parolee's version of the act, if possible, and accompanied by a recommendation of the receiving state. *Handbook on Interstate Crime Control* (1966) 10, 12. Upon receipt of this violation report the authority of the sending state must determine whether to retake the subject, and this entails a preliminary decision whether to revoke.

However, neither state is in a position to conduct the preliminary hearing required by *Morrissey*. Obviously, the State of Wisconsin cannot send its hearing examiner to Hawaii or to Puerto Rico or even to Illinois or Minnesota to conduct such a hearing, and the receiving state is without jurisdiction to make the preliminary determination of probable cause to revoke.

Assuming then that a tentative revocation determination has been made and the subject has been returned to the sending state, the preliminary hearing close to the place of the violation or arrest with possible confrontation by witnesses is impractical if not impossible. What can be done is to lodge the probationer or parolee in an appropriate county jail long enough to confront him with the reports obtained from the receiving state and obtain his story, if it has not already been submitted by the receiving state pursuant to the rules. But this would be a fruitless and unsatisfactory proceeding since it would add nothing of significance to what the Department learned before it made its determination to retake the subject from the receiving state, unless, indeed, the subject were to admit the violation and waive the second hearing. For this, though, an interview, not a hearing, is sufficient.

Perhaps in Scarpelli's case the assistant state's attorney and the investigating police could be induced to come voluntarily to Wisconsin to testify if demanded by Scarpelli, but

clearly they could not be compelled to do so. The Uniform Act for the Rendition of Witnesses Across State Lines in Criminal Proceedings applies only to proceedings or investigations by a grand jury or a criminal action, prosecution or proceeding. *Handbook on Interstate Crime Control* (1966), page 158. And if the witnesses had to be produced from Florida or New York or California the likelihood of voluntary appearance would be lessened and the expense of obtaining them, if they could be persuaded to come, would be greatly increased.

Nor is there any provision for taking depositions, which would be a clumsy and expensive way of obtaining their testimony and would not result in confrontation with the probationer or parolee.

III. Most Modern Cases In This Court Holding A Right To Counsel Go On The Theory Of Applying The Sixth Amendment Through The Fourteenth Amendment.

There would be little profit and an unconscionable waste of time and space in more than a cursory review of this Court's principal decisions on right to counsel. The bulk of them, beginning in 1963, if they involve state cases, and whether they involve counsel at trial or at other stages of the criminal prosecution, are grounded upon the legal theory that the Sixth Amendment right to counsel is applicable to the states through the due process clause of the Fourteenth Amendment:

Gideon v. Wainwright (1963), 372 U.S. 335, 339-40 (trial);

Argersinger v. Hamlin (1972), — U.S. —, 92 S.Ct. 2006, 32 L.Ed. 2d 530, 40 U.S.L.W. 4679, 4680 (trial);

Coleman v. Alabama (1970), 399 U.S. 1 (preliminary hearing);

Escobedo v. Illinois (1964), 378 U.S. 478, 479 (confession);

Miranda v. Arizona (1966), 384 U.S. 436 (confirming principles of *Escobedo*);

Mempa v. Rhay (1967), 389 U.S. 129 (sentencing);

McConnell v. Rhay (1968), 393 U.S. 2 (sentencing);

United States v. Wade (1967), 788 U.S. 218, 224-7 (police lineup);

Gilbert v. California (1967), 388 U.S. 263 (police lineup; applying *Wade* case to a state prosecution);

Kirby v. Illinois (1972), — U.S. —, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (out-of-court identification).

But before *Gideon* this Court found a right to counsel in the due process clause without basing its decision on the Sixth Amendment.

The first to be noted is *Powell v. Alabama* (1932), 287 U.S. 45, 68-69, holding that in a capital case, indigent defendants were entitled to appointment of counsel for their defense. The right to appear by counsel was found not because it was enumerated in the Bill of Rights, but because it was of such a nature that it was included in the conception of due process of law. (More of this later.)

Powell was later extended to other parts of the prosecution than the trial itself, still without reference to the Sixth Amendment, based upon the pressing need of defendants for the guiding hand and assistance of counsel. See for examples:

Moore v. Michigan (1957), 355 U.S. 155 (plea of guilty);

Hamilton v. Alabama (1961), 368 U.S. 52, 54 (arraignment).

In *White v. Maryland* (1963), 373 U.S. 59, decided just after *Gideon*, this Court in a *per curiam* held that *Hamilton* applied to a preliminary hearing at which the uncounseled defendant "pleaded guilty," which purported plea was used against him at his trial. There was no reference to either *Gideon* or the Sixth Amendment.

Pre-*Gideon* cases were developed in the light of the rule of *Betts v. Brady* (1942), 316 U.S. 455, 461-462, that "the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment," now overruled on the right to counsel by *Gideon* and *Argersinger*.

Other cases in which a right to counsel has been found by this Court to exist on due process grounds where the Sixth Amendment does not apply are:

In *In Re Gault* (1967), 387 U.S. 1, 36-37, the right to counsel in juvenile delinquency hearings, although not themselves criminal prosecutions, was based on the proposition that the needs of a child whose liberty was in danger for assistance of counsel were the same as those of an adult, quoting *Powell*.

In *Douglas v. California* (1963), 372 U.S. 353, the right to appointed counsel for an indigent appeal in a criminal case was based on the equal protection clause since persons who could afford to pay attorneys were, of course, permitted to appear by counsel. Exclusion of retained counsel from revocation hearings eliminates the equal protection problem in this context.

In *Goldberg v. Kelly* (1970), 397 U.S. 254, 270-271, holding that hearings are required before termination of Aid to Families with Dependent Children and similar aids, this Court held that the recipients of such aid must be permitted to appear at such hearings with *retained* counsel if they so desire, but not that counsel must be appointed for indigent ones (presumably the bulk of such beneficiaries). This was based solely upon a partial quotation from *Powell v. Alabama* that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," and the assertion that "counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipients." (None of these points are applicable in revocation hearings.) To this day, there is no judicial or administrative requirement for assigning counsel in these hearings.

It is fair to say that the cases which are not grounded on the Sixth Amendment and which find a right to counsel in the due process clause of the Fourteenth Amendment independent of the Bill of Rights have their foundation in a determination that representation by counsel is essential to reliable fact finding and protection of the legal rights of the party represented. This is not the case in probation and parole revocation hearings, at least in a system such as that of Wisconsin where the entire apparatus is manned by professionals strongly motivated in favor of the best interests of the probationers and parolees although necessarily ever mindful of the obligation to protect the community and its members against antisocial conduct by persons in their charge.

It remains to observe that at least a plurality of this Court in *Kirby v. Illinois* (1972), — U.S. —, 92 S.Ct. 1877, 32 L.Ed. 2d 411, limited the right to counsel at lineups strictly

to cases within the Sixth Amendment, excluding those occurring before commencement of the criminal prosecution.

And this may presage a like determination regarding parole and probation revocation hearings regarding which this Court has just now said in *Morrissey v. Brewer* (1972), — U.S. —, — L.Ed. 2d —, 92 S.Ct. 2593, 2600, 40 U.S.L.W. 5016, 5018-5019:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."

IV. State Courts And United States Courts Of Appeal Have Differed Among Themselves On Whether There Is A Constitutional Right To Counsel At Revocation Hearings.

A recent Annotation canvassing the case law on the right of alleged parole violators *vel non* to appear by counsel appears in (1970) 33 A.L.R. 3rd at 272-282.

The first case was *Fleming v. Tate* (Ap. D.C. 1946), 156 F. 2d 848, 849, in which the court held that the statutory right of a District of Columbia parolee to a hearing on charges of violation included the right to representation by retained but not by assigned counsel, and to present witnesses.

Other cases, holding that there is *no* right to *appointed* counsel are:

Jones v. Rivers (4th Cir. 1964), 338 F. 2d 862;

Hyser v. Reed (1963), 115 App. D.C. 254, 318 F. 2d 225, *cert.* den. 375 U.S. 957;

Martin v. U.S. Board of Parole (D.C. Dist. 1961), 199 F. Supp. 542;

Lavendera v. Taylor (D. Kan. 1964), 234 F. Supp. 703 affirmed (10th Cir. 1965), 347 F. 2d 989;

U.S. ex rel. Bradshaw v. Parker (M.D. Pa. 1969), 307 F. Supp. 451.

Cases holding that there is *no* federally protected constitutional right to counsel are:

Dunn v. California Department of Corrections (9th Cir. 1968), 401 F. 2d 340, 342;

Eason v. Dickson (9th Cir. 1968), 390 F. 2d 585, 588;

Gonzales v. Patterson (10th Cir. 1966), 370 F. 2d 94 (*per curiam* memorandum);

Williams v. Patterson (10th Cir. 1968), 389 F. 2d 374;

Washington v. Hagan (3rd Cir. 1960), 287 F. 2d 332, 334, *cert.* den. 366 U.S. 970;

Robinson v. Cox (1966), 77 N.M. 55, 419 P. 2d 253;

In Re Tucker (1971), 95 Cal. Rptr. 761, 486 P. 2d 657, 660-661;

Johnson v. Stucker (1969), 293 Kansas 253, 453 P. 2d 35, *cert.* den. 396 U.S. 904.

The federal cases are reviewed and summarized, including *Hyser v. Reed* (1963), 115 App. D.C. 254, 318 F. 2d 225, *cert. den.* 375 U.S. 957, in *Jones v. Rivers* (4th Cir. 1964), 338 F. 2d 862. Those which, like *Jones*, held that retained counsel must be permitted to appear but counsel need not be assigned for indigents ignored or passed over the danger that such a result would produce a holding that the equal protection clause requires assignment of counsel if retained counsel is permitted to appear. See the concurring opinion of Judge Sobeloff, 338 F. 2d at 876 and *Earnest v. Willingham* (10th Cir. 1969), 406 F. 2d 681 and compare *Douglas v. California* (1963), 372 U.S. 353. See also, *Robinson v. Cox* (1966), 77 N.M. 55, 419 P. 2d 253.

V. Wisconsin Case Law Relating To Revocation Hearings And Representation By Counsel.

The Wisconsin Supreme Court has sought a *modus vivendi* with the rules announced by the Court of Appeals for the Seventh Circuit, in its approach to the problem presented to this Court.

After holding in many unpublished opinions, including this case (see R. 6-7), that no hearing was required for revocation of parole or probation, the Wisconsin Supreme Court in April, 1971, decided to follow the decision of the Court of Appeals in *Hahn v. Burke* (7th Cir. 1970), 430 F. 2d 100, decided August 19, 1970, rehearing denied September 29, 1970, in the case of *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 185 N.W. 2d 306. There was pending at that time in this Court a petition for certiorari in the *Hahn* case which was subsequently denied, 402 U.S. 933. In *Hahn* the Seventh Circuit held a probationer entitled to a hearing on revocation but was silent on the subject of counsel.

In *Johnson*, the Wisconsin Supreme Court considered and *specifically rejected* the claim that the alleged violator had a constitutional right to be represented by counsel, citing *Mempa v. Rhay* (1967), 389 U.S. 128 and a number of cases from lower federal courts and other states. 50 Wis. 2d at 553-555.

The hearing envisioned by *Johnson* was a simple affair, "giving petitioner a reasonable opportunity to explain away the accusation that he had violated the conditions of his probation or parole, * * * not * * * a formal trial-type hearing and * * * technical rules of evidence need not be observed." 50 Wis. 2d at 548-549.

Next, the Court of Appeals in December, 1971, made its decision below holding that there *was* a constitutional right to representation by counsel, contrary to the freshly announced holding of the Wisconsin Court in *Johnson*. The Wisconsin court then took the first opportunity to reverse itself again in a case involving a juvenile who had been released to field supervision, disappeared for five weeks and was arrested by police after which he was returned to the Department's reception center and after a hearing at which his counsel was excluded, was reassigned to the boys school from which he had been released. He commenced a habeas corpus action in the Wisconsin Supreme Court which, after issue was joined and the cause argued orally, referred it to a referee where evidence was stipulated into the record upon which the referee made a report to the supreme court unfavorable to the juvenile. On May 4, 1972, the supreme court — without waiting for a motion or brief or argument, and dividing four to three — decided to follow *Gunsolus v. Gagnon* (1971), 454 F. 2d 416 (this case) on the question of counsel and to apply it to the juvenile case, ordering him remanded to the Department for a hearing in

accordance with the opinion, meaning *inter alia* with counsel, or that he be again released to field supervision. *State ex rel. Bernal v. Hershman* (1972), 54 Wis. 2d 626, 196 N.W. 2d 721.

The respondent in *Bernal* moved for a rehearing on the grounds, among others, that the case had become moot because Bernal's release had been ordered by another court pursuant to *In Re Gault* (1967), 387 U.S. 1, on the ground that his original commitment was invalid, prior to the decision of the supreme court, but the rehearing was denied. 54 Wis. 2d at 637. The mandate, however, was set aside and the opinion slightly modified.

The petition for certiorari in the present case was pending at that time. We were unable to petition for certiorari in *Bernal* because it had become moot. Since it was decided solely on federal grounds, on the issue of the right of counsel, it will necessarily fall if this Court disagrees with the Seventh Circuit on that issue in the present case.

Next, the supreme court was confronted with an adult case in which probation had been revoked by the department and the defendant returned to court for sentencing, which had been withheld at the time of conviction. Sentence was first imposed without counsel representing the defendant but ultimately that sentence was vacated and he was resentenced with counsel present in his behalf and credit was given for the time already served. The Supreme Court on June 30, 1972, citing *Bernal* and *Gunsolus* and dividing five to two, held that the petitioner was entitled to a probation revocation hearing with counsel and remanded the cause for that purpose. *Oestrich v. State* (June 30, 1972), 55 Wis. 2d 222, 198 N.W. 2d 664. It has been determined not to petition this court for certiorari in that case for two reasons:

1. The record is not appropriate since it contains a signed waiver of hearing by the defendant,/[1] and

2. Again, the case having been decided solely on federal grounds, it will fall as precedent if this Court disagrees with the Seventh Circuit on the issue of the right to counsel.

Although the decision in *Oestrich* was announced four days after certiorari was granted in this case, it was undoubtedly prepared before that and it does not appear that the court was aware that certiorari was granted.

/[1] "I, Lawrence Oestrich, having been advised that I am alleged to have violated my probation by the following:

'The aforesaid has failed to keep himself steadily employed, has left the state without permission, has failed to keep in contact with his probation officer and has demonstrated he is a poor candidate for probation supervision.'

and being further advised that I have a right to a hearing on the question of probation revocation, hereby voluntarily waive my right to a hearing to contest the allegations that I have violated the terms of my probation.

/s/ Lawrence Oestrich

Signed in the presence of:

/s/ Otis Lund

/s/ James Kavanagh

Dated:

Oct. 6, 1970"

The material facts leading to the execution of the waiver and the order of the department revoking the defendant's probation are set forth in a letter to the sentencing court, and appear in the record as follows:

"The defendant had absconded to California on August 2, 1970, and returned to Wisconsin on August 26, 1970; he failed to report his return to his probation officer, and was apprehended by the Madison Police Department, on August 28, 1970, pursuant to the department's order therefore dated August 13, 1970, the defendant having been advised both orally and in writing as to the reason for the probation officer's recommendation that his probation be revoked and that he be returned to the court." (R. 15, 16) State's Brief, page 4.

It seems to counsel that the alacrity of the Supreme Court of Wisconsin in deciding *Bernal* and *Oestrich* as it did may have been owing to a desire to resolve a serious impasse existing in Wisconsin. Not only had the Court of Appeals held there was a right to counsel in probation revocation cases, but the United States District Court for the Eastern District had held the same with reference to parole revocations. *Goolsby v. Gagnon* (E.D. Wis., 1971), 322 F. Supp. 460. This case and quite a number of others are now on appeal in the United States Court of Appeals under submission awaiting the decision of this case.

The Department has no authority to appoint counsel for an indigent parolee or probationer nor, probably, should it have such authority. Compare *Jones v. Rivers* (4th Cir. 1964), 338 F. 2d 862. The courts have no statutory authority to appoint counsel for indigent parolees, but perhaps have colorable authority to appoint counsel for probationers. It was therefore impossible to comply with the command of *Goolsby*, but some courts were persuaded to appoint counsel to represent indigent *probationers*. It was of no use to conduct revocation hearings without counsel for indigent probationers and parolees, since the federal courts would simply enlarge them on habeas corpus. Hence *Bernal*, where the court ruled that the committing court must appoint counsel for the indigent, and *Oestrich* extending *Bernal* to an adult case.

VI. This Court In *Mempa v. Rhay* (1967), 389 U.S. 128, Required Representation By Counsel At Sentencing Only, Not At The Probation Revocation Hearing.

At the risk of beating a dead horse, we briefly point out that this Court in *Mempa* did not (as the district court below and some other courts have thought) hold that a probation

revocation hearing was part of the criminal prosecution at which the probationer was entitled to counsel. The holding and the state's contention are stated at 389 U.S. 134-135:

> "There was no occasion in Gideon to enumerate the various stages in a criminal proceeding at which counsel was required, but Townsend, Moore, and Hamilton, when the Betts requirement of special circumstances is stripped away by Gideon, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. In particular, Townsend v Burke, supra, illustrates the critical nature of *sentencing* in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at *sentencing*. Many lower courts have concluded that the Sixth Amendment right to counsel extends to *sentencing* in federal cases.
>
> "The State, however, argues that the petitioners were *sentenced* at the time they were originally placed on probation and that the imposition of sentence following probation revocation is, in effect, a mere formality constituting part of the probation revocation proceeding." (Emphasis supplied.)

This Court then replied to the state's argument by referring to the importance of counsel at a Washington sentencing *but said nothing of the revocation aspect.* Clearly, if the Washington judge had held the revocation hearing without counsel, revoked probation and adjourned the case for sentencing, at which the defendant was represented, this Court would have found no denial of due process.

See also *McConnell v. Rhay* (1968), 393 U.S. 2, 4.

VII. This Court Has Just Now Held That Parole Revocation Is Not Part Of The Criminal Prosecution.

In *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, 40 U.S.L.W. 5016, 5018, in which this Court left open the question of the right of a parolee to representation by counsel at a revocation hearing, the Court said:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. *Mempa v. Rhay*, 389 U.S. 128 (1967). Parole arises *after the end of the criminal prosecution, including imposition of sentence.*" (Emphasis supplied.)

So far as this goes toward eliminating Sixth Amendment considerations from determining the question of right to counsel at parole revocation hearings, it is equally appropriate to the problem before the Court of a probation revocation after sentencing. It is submitted, also, that in principle it applies at least to an administrative revocation hearing before sentencing where the probationer is in exactly the same posture before the department as though he had already been sentenced, the only difference being that upon revocation he is taken to the court for sentencing (which shall then be imposed without further stay) rather than directly to the penal institution. The citation of *Mempa* so indicates.

VIII. The Need For Counsel Does Not Exist In Revocation Cases.

The classical statement of the need of a defendant for counsel in a criminal case is in *Powell v. Alabama* (1932),

287 U.S. 45, 68-69, quoted in *Gideon v. Wainwright* (1963), 372 U.S. 335, 344-345 and in *Argersinger v. Hamlin* (1972), —U.S.—, 92 S.Ct. 2006, 32 L.Ed. 2d 530, 40 L.W. 4679, 4681:

> "The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

These reasons for having counsel do not apply to administrative revocation proceedings:

A. Validity of the charge.

The body of technical rules by which criminal complaints, indictments and informations are tested has no application to charges of probation and parole violation. The latter are drawn not by lawyers supposedly skilled in pleading, but by social workers functioning as probation and parole officers and administrators. Reasons for technical exactness applicable to criminal pleadings are not relevant. Charges for revocation are short narrative statements of what the "client" did in violation of the conditions of his conditional "freedom." No lawyer is needed to challenge their sufficiency.

B. The rules of evidence do not apply.

It is commonplace that the revocation hearings, like most administrative proceedings, are not subject to the rules of evidence applicable to trials in a court, whether with or without a jury. This has been most recently recognized by this court in *Morrissey v. Brewer* (1972), — U.S. —, 92 S.Ct. 2593, — L.Ed. 2d —, 40 U.S. L.W. 5016, 5021:

> "* * * We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense: it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial."

The Wisconsin Supreme Court in *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 549, 185 N.W. 2d 306, adopted the following language from *Johnson v. Stucker* (1969), 203 Kansas 253, 453 P. 2d 35, 42 *cert.* den. 396 U.S. 904:

> "A revocation hearing is not a trial in the traditional sense, nor is the board necessarily concerned with the commission of a criminal offense. As a matter of fact, a prisoner having been granted conditional freedom on parole, the primary question before the board is whether within its discretion the parolee is still a good parole risk. . . . By its very nature a revocation hearing does not envision strict observance of technical rules of law and procedure accorded a judicial proceeding. Any relevant information, even though in the form of letters, reports of parole officers, and similar matter, which may aid the board in making its determination, may be considered. . . ."

In holding that federal parolees are not entitled to compulsory process to procure witnesses in revocation hearings before the Parole Board, the United States Court of Appeals for the District or Columbia Circuit, per Judge Burger, stated in *Hyser v. Reed* (App. D.C. 1963), 318 F. 2d 225, 240:

> "As to the constitutional claim, it is sufficient to note that the Parole Board is not bound by the rules of evidence in considering information relating to parole violation. It is the established practice of the Board to consider all communications, i.e., affidavits, letters, telegrams, prison records, even though hearsay in the strict evidentiary sense, in reaching a conclusion. This flexibility affords greater protection to alleged violators than would be allowed in an adversary proceeding with conventional rules of evidence."

(*Hyser* held also that there was no constitutional right to representation by appointed counsel in such hearings. *Id.* at 238.)

Even illegally seized evidence is admissible in revocation proceedings.

United States v. Hill (7th Cir. 1971), 447 F. 2d 817, (U.S. probation revocation);

United States ex rel. Sperling v. Fitzpatrick (2nd Cir. 1970), 426 F. 2d 1161 (U.S. parole revocation);

In Re Martinez (1970), 83 Cal. Rptr. 382, 463 P. 2d 734, 740-741 (state parole revocation).

Compare *United States ex rel. Santos v. New York State Board of Parole* (2nd Cir. 1971), 441 F. 2d 1216. (Evidence seized by a parole officer on search of a parolee's room under circumstances impermissible against an ordinary person was held admissible on his trial for a new offense.)

It is customary, in the case of former narcotic addicts on probation or parole to require as a condition thereof that they submit to the police department on demand without warning urine specimens to be tested for opiates, which is a reasonable way to try to prevent relapses into addiction.

Under Paragraph 3 of the Probation Agreement (Ap. 12) the probationer is required to keep his agent informed of his whereabouts and activities at all times and to submit such reports as may be required. Accordingly, statements may be obtained from him without the *Miranda* warnings and may be used against him *for purposes of revocation.*

In Re Tucker (1971), 95 Cal. Rptr. 761,
486 P. 2d 657, 658;

In Re Martinez (1970), 83 Cal. Rptr. 382,
463 P. 2d 734, 740-741.

The probationer or parolee, being in custody of the Department is subject to search of his quarters as his cell would be if he were in prison. He waives his Fifth Amendment rights against self-incrimination. One who is on probation or parole may not get himself into a position where he cannot be searched without disclosure of incriminating evidence, or refuse to give truthful answers regarding his activities and whereabouts without incriminating himself.

The probationer or parolee may be immune from use of such evidence against him in a criminal prosecution (see *U.S. ex rel. Sperling v. Fitzpatrick, supra,* but compare *U.S. ex rel. Santos v. New York State Board of Parole, supra*) but not in revocation proceedings.

C. No defense requiring legal skill need be prepared.

It is a fact of life that no probationer or parolee is recommended for revocation unless he did the things alleged against him. This is because the probation and parole agent is so strongly motivated against revocation that he does not recommend it unless he is sure, and to that end he investigates

with as much thoroughness as an attorney would and perhaps with better entree to information sources. Of course, he must depend upon others, in some cases, and must make judgments on their reliability, but always following up all possible leads, and where possible interviewing the "client" and checking out his story. He is not hostile to the probationer or parolee, nor is he an advocate bent upon his destruction.

Of course, some facts, such as absconding, are self-evident and no excuse is acceptable, and many other facts are within the personal knowledge of the agent or are reflected in the file he has received showing background facts, which influence the decision to recommend revocation./[1] No defense counsel is going to alter such things by "marshalling the facts."

D. No plea bargaining is possible.

So much for the reasons advanced in Powell.

The most useful function an attorney representing a guilty defendant charged with crime can perform is not in testing the sufficiency of the charge — that can be amended or the state can start over — or in applying the rules of evidence at trial, or in preparing his defense, be it complete or only partial, as in the case of conviction on a reduced charge. Given a guilty defendant and strong proofs on the part of the prosecution, the most useful function of the defense counsel is in plea bargaining. If in return for a guilty plea he can induce the prosecutor to dismiss some charges or reduce the degree of the charge, or substitute a lesser offense, or recommend a lighter sentence or probation, he has accomplished a great deal for his client.

But in revocation hearings there is no reason for plea bargaining. It is all or nothing with the scales heavily tipped

[1] See materials in Addendum.

against his client. The judgment of the probation or parole agent and his superiors that revocation is the only solution to the problem of the violator is bound to be respected and any alternatives which may have occurred to the attorney, at best an amateur in the field of probation and parole supervision, must have occurred to and been rejected by the supervising agent and his superiors, professionals whose business it is to know the alternatives and apply them. See materials in the Addendum.

In summary, since there is no middle ground, there is no basis for negotiation.

E. There are no technical pitfalls to be avoided in revocation hearings.

In *Hamilton v. Alabama* (1961), 368 U.S. 52, this Court pointed out that the arraignment was a critical stage of a criminal prosecution in Alabama at which the accused requires the guiding hand of counsel because he must at that stage make pleas in abatement or a plea of insanity or waive his right to do so. No such situation exists in revocation cases, at which the probationer or parolee is free to advance whatever defenses or mitigating circumstances he thinks he has without reference to any procedural technicalities whatsoever.

F. There is no "attorney for the prosecution."

One reason frequently given for requiring counsel for a defendant in a criminal trial is that he must face an opponent in the form of a district attorney. This has not been true in the case of revocation hearings under the rule of *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 553-555, 185 N.W. 2d 306 holding that the alleged violator is not entitled to representation by counsel. Both sides appear without

counsel and tell their stories, subject to questioning by the hearing examiner, who is an attorney and is neutral. It is only since the decision of the court below made it necessary to permit representation of the probationer by counsel that the Department has found it necessary to assign some of its staff counsel to appear for the Division of Corrections, mainly because the probation agents feel the necessity for representation if they must confront counsel on the other side. Thus a simple inquiry becomes what it ought not be, an adversary proceeding.

IX. Intrusion Of Attorneys Into The Probation And Parole System Is A Negative Factor.

As one who has been an active member of the legal profession for 37 years, the writer is proud of that profession. Lawyers as a class are probably the most versatile in society, capable of handling litigation and other matters dealing with the widest variety of subjects and fields of learning such as medicine, accounting and engineering. But we are not trained by education or professional experience to deal with correctional matters or to aid those who are expert in that field in arriving at correct determinations.

We are by instinct and training contentious, taking up the cause of our clients with zeal and vigor. But as the 3rd Circuit said in *Washington v. Hagan* (3rd Cir. 1960), 287 F. 2d 332, 334:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at

> rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."

We learn from *Robinson v. Cox* (1966), 77 N.M. 55, 419 P. 2d 253, 255, that the New Mexico legislature enacted that "[t]he [parole] board shall not be required to hear oral statements or arguments by attorneys or other persons not connected with the correctional system."

Wisconsin does not have such a statute, but as shown above it abolished probation revocation hearings altogether 25 years ago (at which attorneys never appeared anyway) and never provided for parole revocation hearings.

There being nothing to gain from the attorney's appearance, there is yet some disadvantage. Hearings with counsel tend to take more time in arriving at their inevitable result, making fewer hearings possible in the parole agent's and the examiner's available time. Sometimes adjournments or continuances are necessary. Any therapeutic value of the hearing as envisioned by 4 Attorney General's *Survey of Release Procedures* (1939), 247 disappears if the violator's "irrational action" and "twisted thinking" are minimized or even supported by his attorney. Nor will his "true psychology" or the "trend of his thought." *Id.*, be accurately revealed if filtered through a legal spokesman.

If counsel appears for the alleged violator the agent demands that the department furnish him with representation (increasing the expense) and presto, the simple little personal hearing has become an adversary trial.

X. Probationers And Parolees Should Not Be Permitted To Retain Counsel For Revocation Hearings.

Since attorneys are unable to perform any real service for probationers and parolees who are up for revocation, there are three reasons why probationers and parolees should not be permitted to retain them:

1. Hardly any persons on probation or parole are wealthy although a great many have too much money and other assets to qualify as indigent. For every James Hoffa on parole there must be thousands who have the money to retain counsel but cannot really afford to do so. Such funds as they have should be diverted to more productive uses, such as support of their families, and all of them will need money when they are released at a future date. They ought not spend it in the vain hope that somehow an attorney can save them from revocation if they could not do so by their own efforts.

2. Those who are unable to employ counsel are likely to feel discriminated against.

3. If those who can afford counsel are permitted to appear by counsel, it is difficult to conceive of an answer to the claim that equal protection requires assignment of counsel to those too poor to pay for their own. The State of Wisconsin does not wish to be in the position of denying to the poor and indigent the equal protection of the laws by permitting appearance of counsel on the behalf of only those who are financially able to pay.

XI. Assignment Of Counsel At Public Expense Would Be An Intolerable Waste Of Public Funds.

As this Court must be aware, municipalities, counties and states throughout this country are desperately short of

tax funds for the general purposes of government. Washington is constantly being importuned for grants in aid, and outright revenue sharing is a current political issue. Indignant meetings of angry property taxpayers are reported in the daily press. Departments of state government are directed by the governor to reduce expenditures, even at a time when their duties are being increased.

Against this background, corrections must compete for the tax dollar with higher profile demands of education, public assistance, law enforcement, pollution control, and dozens more. What the probation and parole system needs is more money for manpower to supervise its clients and help them to obtain training and adjustment and to avoid relapse into criminal ways. Any expenditure of state funds for counsel to resist revocation is almost certain to be reflected in less money available for probation and parole agents. Moreover, as pointed out above, the department will necessarily have to employ attorneys to represent the Bureau of Probation and Parole.

Milwaukee County is still reeling under the financial impact of *Argersinger v. Hamlin* (1972), — U.S. —, 92 S.Ct. 2006, 32 L.Ed. 2d 530. It is claimed that that county is absolutely without funds to pay for counsel in revocation hearings. No state funds have been appropriated nor are likely to be.

In view of this financial crunch, it is wholly impossible to make a rational justification for the payment of assigned counsel to make futile attempts to head off what have become virtually inevitable revocations.

If there is some defense or excuse, the probationer has every opportunity to inform his agent and his agent's supervisor and, latterly, the hearing examiner, with every assurance

that unless his explanation or excuse is totally ridiculous it will receive consideration.

In the state's attorney's office Scarpelli gave neither a denial nor an excuse—just a complete admission replete with corroborative detail and inherent evidence of its voluntary and trustworthy character. (App. 22-27)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and remanded with instructions to modify the judgment of the district court by striking the requirement that the probationer is entitled to the assistance of counsel at the revocation hearing.

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CERTIFICATE OF SERVICE

I the undersigned, a member of the bar of this court, do hereby certify that on September , 1972. I duly mailed three copies of the Brief of Petitioner to counsel for the respondent, addressed as follows:

Mr. William Coffey
Coffey, Lerner & Murray
152 West Wisconsin Avenue
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.....

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ADDENDUM

I.

CRIMINAL JUSTICE ADMINISTRATION MATERIALS AND CASES

by

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An offender who is free in the community may have that freedom withdrawn if he fails to comply with the conditions imposed by the court, the parole board, or other agency which granted that freedom. Less often the offender's freedom may be revoked, even though he has complied with the conditions of his release, because the supervising agent believes the offender is again likely to commit crime if not incarcerated. Whatever

the basis, the scope of the field agent's discretion is enormous because the conditions are commonly very broad and there are few probationers or parolees who do not, on occasion, violate one or more conditions. How the discretion is exercised, who is responsible, and the methods for insuring against inappropriate decisions to revoke are questions of fundamental importance.

1. *Responsibility for the Revocation Decision*

In all situations the supervising field agent plays a very significant part in the revocation decision, since he knows of the offender's conduct and decides initially whether or not to do anything about it. A difference between parole and probation lies in the agent's responsibility to report to an administrative superior in one case and to a judge in the other to have the decision to revoke made official. Parole revocation decisions are commonly wholly administrative. Probation revocation decisions are most often made by a judge, though sometimes they are made administratively.

If a judge suspends *imposition* of sentence and places the offender on probation, there is a practical reason for returning him to court since he alone has authority to impose sentence. However, if the sentence is imposed but its *execution stayed* and the offender put on probation, there is no need to return him to court for sentencing. Some jurisdictions, in this situation, permit administrative revocation. Others still require a judicial decision. Whether this type of decision ought to be "judicial" in nature or "administrative" or whether it makes any important difference, has not been subject to any very careful inquiry. Whichever method is used, the field agent's influence is great, but having to report to a judge, in court, may result in a different decisional process than would result if the agent had to report only to his superior.

2. *Factors Affecting the Decision Whether to Revoke*

The revocation process begins in the first instance with a decision by a parole or probation officer to instigate revocation proceedings. This is by no means an automatic response even when the offender has been arrested for a new crime nor, indeed,

does revocation necessarily accompany or follow conviction of a new offense. Field agents normally are expected to judge each individual case on its merits rather than to follow standard formulas. The individual field agent is controlled only in a general way by agency policies and by his superior within the agency. Agency guidelines are usually broad statements of objectives or procedures with no attempt to specifically direct or curtail field agent discretion. Supervision by an administrator, particularly of trained and experienced agents, is commonly viewed as a form of "consultation" rather than as a review of agents' specific decisions. Initiative and exercise of independent professional judgment are encouraged and supported if they are not totally inappropriate or at odds with agency objectives.

Administrative policy or supervision acts in direct check on agent discretion, if at all, only when the officer has decided to revoke. Decisions to take no action or to use some alternative short of revocation when confronted by violation tend to be of low visibility, much like police decisions not to arrest. Field agents normally make a written record of any discovered violations and of action taken, but this is simply good case recording and is usually not submitted for specific review by higher authorities. While it is technically possible for a judge or parole board member or other designated authority to revoke on his own initiative or over the opposition of the field agent, this rarely happens.

It is tempting, and in certain perspective appropriate, to compare the similarities of the revocation discretion of a parole officer and the arrest discretion of the police. Yet there are differences. For example, the number of arrests made by a policeman has often been taken—however unwisely—as an indication of his workload and even of his competence. Revocation, on the other hand, is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.

Field agents who are trained social workers (and the master's degree in social work is the accepted professional model) claim a certain amount of expertise. Agents who are merely college graduates, or have even less formal education, cannot make the same claim to expertise, though experience can substitute for

formal training to some degree. The correctional position calling for broad field agent discretion rests on the assumption that field agents have social work expertise. The reliance in the police field has been on experience more than training. The claim to expertise is less often made by police.

While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety. The police officer, in contrast, is concerned primarily with public safety.

It would be unfortunate, however, to overemphasize the differences, because there are important parallels in the exercise of discretion by police and probation or parole officers.

Aside from the professional orientation, various other factors affect the probation or parole agent's decision whether to recommend revocation. One is the conceptual and practical difference between probation and parole (or mandatory release). The probationer has not served time (except in the special situation of a short jail term made a condition of probation), while the parolee has. The difference is suggested by the New Mexico Supreme Court:

> One who is paroled is not thereby released from custody but is merely permitted to serve a portion of his sentence outside the walls of the penitentiary, under such conditions as the board may impose and during the pleasure of the board. A paroled prisoner is not discharged from the custody of the prison authorities, but is at all times under the complete custody and control, and subject to the orders of the parole board, whereas, in the case of a suspension of sentence, the person has never commenced service of the sentence and has, therefore, the right of personal liberty. He is not in custody as is a parolee.[b]

It has often seemed that to revoke probation, which means sending a man to prison who has not been there, is more drastic than to revoke parole, which returns a man to prison. This

[b] Robinson v. Cox, 77 N.M. 55, 59, 419 P.2d 253, 256 (1966).

tends to make those who must make the revocation decision more cautious with respect to probationers than they might be to parolees.

The laws often operate to vary the impact of revocation from one state to another. For example, in about half the states, time served successfully on parole counts toward completion of sentence while time served on probation does not. In other states, time is tolled on both probation and parole. If a parolee has five years of his sentence remaining and serves four years of successful parole time before revocation, he must serve only a year where such credit is given but five years where "street time" does not count. In some situations, particularly in jurisdictions where reparole is rare, revocation for a minor rule violation may mean an extensive period of imprisonment for the offender. In other situations, the time remaining under sentence may be so short as to make revocation meaningless. Time served on probation does not at all diminish the possible period of imprisonment upon revocation.

Variations in the intensity of field supervision also affect revocation practices. In some jurisdictions, field supervision of both probationers and parolees is minimal, hardly more than a bookkeeping device. A probation or parole officer who is given a hundred or more offenders to supervise cannot closely follow each one or hope to provide casework services on a regular basis. This agent has little knowledge of conformity to or violation of supervision rules, and revocation therefore tends to become solely dependent on an arrest for a new offense. In effect the police perform whatever supervision or surveillance occurs. It is ironic that where field agents are well-trained, have small caseloads, and perform a more highly professional supervision function, revocations are more frequent. They discover more rule violations and, with clinical competence, are aware of the potential dangers in early signs of nonconformity and are more ready and willing to revoke before a new crime is committed.

The scope and generality of common probation or parole conditions give the field agent a broad range of grounds for revocation should he wish to use them. Requirements such as that the parolee "cooperate" with his field agent are common; the nearly universal condition is that the offender remain "law-abiding."

THE REVOCATION DECISION: A STUDY OF PROBATION AND PAROLE AGENT'S DISCRETION

By Sara K. Hunt
(Unpublished MSW thesis, The University of Wisconsin, Madison, School of Social Work, 1964)[1]

In Wisconsin's correctional system the probation and parole field agent is delegated primary responsibility for initiating the revocation process in cases under his immediate supervision. The agent is not compelled by law or administrative policy, however, to recommend revocation in every case involving known violations or new offenses. In fact, twenty-five percent of the offenders studied who committed new offenses were continued on field supervision, with perhaps short-term jail sentences following commission of new crimes. The authority to exercise discretion in deciding to revoke or not to revoke offenders under supervision is considered necessary if probation and parole are to remain workable systems.

The Decision to Revoke Offenders Under Supervision. The strongest single determining factor in the revocation decision was the seriousness of violation or new offense committed by the offender while under supervision. In view of the field agent's primary responsibility to the community and its protection, this factor would be expected to have importance. Cases where offenders were considered extremely dangerous to the community, however, were relatively infrequent. Revocations were generally based on additional considerations.

1

A youthful offender recently paroled from the Reformatory stole an automobile, taking it across several state lines in an attempt to abscond. He was apprehended by federal authorities, who issued a detainer for violation of the Dyer Act. Parole was revoked and the youth returned to the institution to serve the remainder of his sentence before being turned over to a federal agency.

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[1] Some changes have been made to adapt the thesis to use here, without specific indication of the places at which the organizational changes were made.

In a majority of the cases revoked on conviction of a new offense or as a substitution for conviction, there were some outside pressures. Frequently the crimes committed were of high visibility, resulting in newspaper publicity. At other times police urged revocation when there was suspected but unproven misconduct.

2

A recent parolee was known to be living with a former parolee. Both individuals had extensive prior burglary records and were strongly suspected by the police of committing a series of recent burglaries in the area. Surveillance by police failed to uncover sufficient evidence for arrest. The supervising agent, sharing these suspicions and under pressure from the police department, revoked parole on the basis of minor rules infractions as a precautionary measure.

One principal objective in allowing rules violations to constitute grounds for revocation is to prevent resumption of criminal conduct during supervision. Preventive intervention by agents was not limited to cases considered potentially dangerous to the community but included offenders believed to be in need of a controlled environment or of specialized treatment services available only within the institutions.

3

A chronic alcoholic checkwriter, having refused any assistance from Alcoholics Anonymous, was known to be drinking heavily. Although unemployed, he reportedly had sums of money in his possession. The agent had not received notice of any outstanding checks, but anticipated they would eventually turn up at the D.A.'s office. Parole was revoked in hopes that the offender would resume his participation in AA programs available within the institution.

4

A youthful offender appeared to be making a good initial adjustment on parole. Signs of deterioration became evident, however, when the youth provoked his employer into firing him and made no effort to find other employment. This added strain to the youth's relationship with his stepfather, upon whom the boy projected blame for his delinquent behavior. Increasing association with delinquent

cronies led to the youth's participation in several acts of vandalism in the community. A work-home placement in another city was considered, but rejected due to the subject's defiant attitude toward supervision. While present violations were not considered particularly serious, the agent foresaw continuing delinquency unless action was taken. The decision to revoke was based upon the expectation that attitude toward supervision would improve prior to reparole.

A determining factor in revocations of offenders committing rules violations or relatively minor new offenses was their overall social adjustment in the community. In assessing offenders' adjustment, agents placed particular emphasis on the support of self and family and on the fulfillment of financial obligations to the courts and the community. In most revoked cases agents had persisted in their efforts to help individual offenders to assume these responsibilities and had failed. Revocation also occurred when offenders were totally unresponsive to supervision.

5

A probationer was living with a divorcee and failing to support his family adequately. Other violations were being committed in connection with this association, i.e., drinking in local taverns, leaving the state without permission, driving without a valid driver's license. Revocation followed the offender's arrest in another state on charges of illegal possession of beer in a car and no driver's license.

The offender's responsiveness to supervision as reflected by his attitude and his cooperation with the supervising agent appeared to be a prerequisite for continuing probation or parole supervision under any circumstances. In other words men committing relatively serious violations during supervision might be continued without revocation due to some appreciable changes in their attitudes, whereas others committing similar violations were revoked. What effect agents' workloads and time limitations had on revocation rates could not be determined.

6

A probationer convicted of bigamy was apprehended in the home of the woman with whom he had been ordered not to associate. This occurred within the second month of supervision. The agent recommended revocation on the basis that the case presented an unworkable situation for probation supervision. The offender was returned to court and sentenced to six months in the county jail.

7

In two similar cases the offenders requested revocation rather than continue under probation supervision. Both cases entailed six-month county jail sentences following revocation. When one offender's request was refused, he committed a minor offense to accomplish this end.

8

An habitual offender, presently on probation for a misdemeanor with sentence withheld, had required continuous attention during supervision with complex financial, marital, and behavioral problems. While not a serious offender, he had been arrested numerous times during probation for driving after his license was revoked. He did exhibit some violence when drinking excessively. At the point of revocation, the offender was unemployed, not supporting his estranged wife and his children, and making little effort to alter the situation. Revocation followed the agent's apprehension of the individual in a local tavern, only twelve days before probation expiration. Nonsupport charges were already pending, and the agent felt revocation would affect the subject's complacent attitude.

A factor accounting for some disparities in the revocation decision was the availability or unavailability of resources in the community. The need for outside resources as adjuncts to supervision ranged from intensive psychiatric treatment to jobs and places to live. It was found that the lack of some supportive, stabilizing influences in the community greatly reduced the probabilities that offenders would complete their probation and parole terms successfully.

9

A chronic alcoholic developed a severe case of delirium tremens. The family refused to commit him to a state hospital and could not afford medical services. The agent revoked supervision on the basis of needing institutional facilities not available in the community.

10

A parolee with over one hundred arrests on drunk and disorderly charges was revoked primarily for the nuisance he was causing the police department and for the agent's admitted inability to find a suitable placement within the community.

The Decision Not to Revoke Offenders Under Supervision. Offenders were not revoked when there was merely a suspicion of violation. The decision required proof.

11

Police officials strongly suspected a parolee of participating in a series of recent burglaries in the area. A police "dragnet" was placed around the subject's residence with no results. The supervising agent shared the suspicion that the parolee was involved, but felt he had no basis for revocation without additional proof.

The decision not to revoke offenders was made in spite of nondangerous violations during supervision and was frequently based on considerations other than the individuals' behavior alone. Thus it was found that offenders who were supporting their families were less apt to be revoked than those not supporting their dependents or having none, despite similar violations during supervision. Factors such as length of remaining sentence, especially when extremely short, sometimes had decisive influence in continuing field supervision in cases otherwise warranting revocation. Perhaps fundamental to the question of continuing the supervision of offenders who violate their probation or parole is the willingness of the individual field agents to provide those "second chances."

12

A recently divorced probationer admitted having impregnated a girlfriend, with whom he had been instructed not to associate. On the basis of the offender's willingness to pay the medical expenses and support of the expected child, the supervising agent decided against revocation.

13

An offender, placed on probation for nonsupport, immediately absconded from supervision. He was apprehended and reinstated on probation by the sentencing court. Throughout supervision worthless checks were written, usually in connection with heavy drinking, but were invariably made good after the agent applied pressure. As the offender did begin making support payments during supervision, the agent felt as much was being accomplished as could be expected. The probation sentence was allowed to expire.

14

A parolee was arrested his first day under field supervision for "drunk and disorderly conduct" and was subsequently charged for nonsupport on a warrant issued prior to his institutionalization. The agent knew the offender had previously absconded from field supervision as a probationer and, under these circumstances, might do so again. The agent did not consider the offender to be dangerous, however, and wanted to provide him an opportunity to prove himself. The offender had secured employment and appeared willing to cooperate. The supervising agent decided against revocation.

Just as lack of community resources influenced the decision to revoke some offenders, so the supportive help of outside persons or agencies in the community sometimes accounted for the continuation of field supervision despite violations. Examples of the types of resources considered to be instrumental in the supervisory process included reliable family members, employers, and interested citizens and/or the specialized services of social welfare and mental health agencies.

15

The supervising agent received a report that a parolee previously convicted of statutory rape had made sexual overtures toward a female client while he was working as a

door-to-door salesman. The employer came personally to the agent to urge that the parolee be given another chance. An agreement was reached whereby the offender would not be assigned evening house calls while working alone. The agent decided against revocation for the alleged violation.

The use of alternative actions in place of revocations tended to be more prevalent among probation cases than parole when comparable violations had been committed. One reason believed to account for this difference was the large proportion of misdemeanor probation cases having less than one-year sentences. Frequently supervision of misdemeanants was extended beyond the date of sentence expiration rather than revoking probation in cases having unfulfilled court financial obligations. Misdemeanor cases cannot be sentenced to state correctional institutions; consequently, offenders in need of specialized medical or psychiatric services must be accommodated in the community.

There were several cases which agents did not feel would benefit from institutionalization sufficiently to justify revocation. This evaluation may have been based on the offender's low mental capacities or on results of previous institutional experiences. Offenders considered beyond rehabilitating were sometimes continued on supervision despite repeated arrests and jail sentences due to chronic alcoholism, vagrancy, and the like. These cases were typically considered "nuisances" to local law enforcement agencies but not particularly dangerous to the community.

16

A probationer seriously assaulted his sister-in-law during a family dispute. Although no criminal charges resulted, family members felt that psychiatric attention was urgently needed. In addition to many rules violations, the subject's drinking problem had reached such proportions that an institutional placement was considered imperative by the agent. As a misdemeanant the alternative would have been a county jail sentence. A commitment to a state hospital was arranged without revoking probation.

17

A parolee with numerous arrests for drunk and disorderly conduct while under supervision was bringing considerable agitation from the police department for a revocation. The

offender's parole term, however, was very close to reaching the Mandatory Release date. In view of his previous institutional experience, the offender was believed to have attained the "maximum benefits" possible. The parole term was allowed to expire, despite several arrests and jail sentences.

Considered fundamental in the decision to revoke or not to revoke offenders is the extent of potential danger posed by their behavior in the community. Thus it was found that offenders whose behavior was not viewed as particularly dangerous, whose violations were of low visibility or consequence to the community, whose social adjustment was at least marginal, tended not to be revoked when violations became known to the agents.

18

A recently paroled offender, previously convicted of forgery and writing worthless checks, was arrested for illegal possession of beer in a car and for resisting arrest. The agent felt the case prognosis was fairly good, despite these violations, in that the individual held a responsible job, had cooperated well under supervision, and had been in no other difficulties with the law. With twenty-seven months remaining on the latter's parole term, the agent recommended a short county jail sentence for the offenses in place of a revocation of parole.

19

Two recent parolees, both with over two years remaining on parole, were working in a local junk yard where parolees fresh out of institutions were frequently hired for low wages. The two offenders were accused of stealing some merchandise and petty cash from the employer. When the circumstances became known, however, the agent felt the employer had provoked the theft by leaving the parolees in charge of the yard after firing them and refusing to pay them back wages. The case was allowed to go into court, where charges were dismissed upon payment of restitution and costs.

In some cases an indication of change in attitude toward supervision or in cooperating with the supervising agent was sufficient basis for deciding to continue field supervision without revocation.

20

A youth probationer was arrested for a minor offense, formally charged and convicted. The agent felt the incident was directly related to recent family problems, which had resulted in the youth being forced to leave home. From a discussion with the offender, the agent decided an independent living arrangement could be established without risking further violations. A short jail sentence was served for the offense committed, and probation was continued.

II.

NOTE: WISCONSIN CRIMINAL PROCEDURE

1966 Wisconsin Law Review 403, 527-529

3. REVOCATION OF PROBATION AND PAROLE

a. Administrative Procedure and Internal Review

An offender convicted of a felony outside Milwaukee County who is placed on probation or released on parole is in the legal

custody of the Department of Public Welfare.[689] Statutory powers given the department to revoke probation and parole are very broad. Probationers convicted of felonies (outside Milwaukee County) may be brought before the court for sentence. Probationer must be sentenced without further stay, or, if already sentenced, he may be ordered directly to an institution.[690] Parolees may be returned to prison at any time on order of the department.[691] When an agent makes a decision to recommend revocation, the probationer or parolee is placed in custody if he is available and not already in custody. If further investigation by the agent substantiates the decision to recommend revocation, the agent summarizes the reasons for revocation and submits a case history, summary, and recommendation to his district administrator. If the district administrator concurs in the recommendation to revoke, he submits the recommendation to the regional supervisor. If the regional supervisor concurs, the recommendation is submitted to the Director of the Department of Public Welfare. It is the decision by the director to accept the recommendation which makes revocation effective. Upon revocation the offender is returned to prison.

Administrative decisions reversing the recommendation of the revoking agent seldom occur. The theory of corrections places a strong emphasis on the relationship between the individual agent and the parolee. Thus a supervisor would be loath to interfere with the agent's discretion.

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[689] Wis. Stat. §§ 57.01(1), .06(3) (1963).

[690] Wis. Stat. § 57.03(1) (1963) provides that "if a probationer in its charge violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if already sentenced may order him to prison . . . ." On misdemeanors, see Wis. Stat. § 57.04 (1963). On probation in Milwaukee County, see Wis. Stat. § 57.025 (1963).

[691] Wis. Laws 1965, ch. 520, § 6, provides that "a certified copy of the order shall be sufficient authority for any officer to take the prisoner to the institution from which he was paroled . . . ."

The parole board sees all parole violators whose parole has been revoked approximately thirty days after the violator's arrival at the prison.[692] This appearance is a personal one, no representation of the prisoner's interest being allowed at the hearing.[693] The purpose of the hearing is to determine the amount of good conduct time to be forfeited because of violation and to determine the time for the next parole hearing. The grounds for and the propriety of the revocation are in issue, but only to the extent that parole can be reinstated if the board determines that the revocation was unwarranted. However, reinstatement is seldom recommended.

The theory behind the relatively simple revocation procedure in Wisconsin is that probation and parole can be more freely granted and liberally administered if the probationer or parolee can be returned to prison without having to go through a highly formalized adversary proceeding. The department takes the position that if the revocation decision were to be subject to judicial challenge, society's best interests would not be served since the standard for grant would have to be tightened and fewer probations and paroles granted.

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[692] Division of Corrections, Wis. State Dep't of Public Welfare, Parole Board Procedures and Practices 22 (1963).

[693] *Ibid.* Although the manual does not explicitly say so for violator hearings, it does explicitly say so for parole hearings. *Id.* at 16.